



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

May 12, 2014
PR 14-10

Mr. Scott Pickering

Re: East Bay Newspapers v. Rhode Island Department of Public Safety

Dear Mr. Pickering:

The investigation into your Access to Public Records Act (“APRA”) complaint filed against the Rhode Island Department of Public Safety (“DPS”) is complete. By correspondence dated February 6, 2014, you allege the DPS violated the APRA when it denied your January 31, 2014 request wherein you sought a copy of the “report of an investigation conducted by state police concerning [Mr. John Doe].”¹ It is noteworthy that after investigation by the DPS, no criminal charges were brought against Mr. Doe.

In response to your complaint, we received a substantive response in affidavit form from the Chief Legal Counsel for the DPS, Lisa S. Holley, Esquire. Attorney Holley states, in pertinent part:

“On January 31, 2014, [Mr.] Tom Killin Daghish, from the Sakonnet Times, emailed Rhode Island State Police Major Todd Catlow * * * requesting ‘a report of an investigation conducted by state police concerning [Mr. John Doe].’ * * *

¹ We decline to name this person for privacy reasons.

Rhode Island Department of Public Safety Paralegal [Ms.] Leilani Audette researched the RMS system, and determined that the information requested was in fact not contained in a report 'reflecting the initial arrest of an adult and the charge or charges brought against an adult,' but in an offense report which did not result in the filing of criminal charges.

On February 3, 201[4], Ms. Audette provided written notice to Mr. Daglish stating that the requested records were not public under APRA.

In the written correspondence to Mr. Daglish, Ms. Audette denied the request based on RIGL Section 38-2-2, which excludes personal information relating to an individual in any files and law enforcement records that could reasonably be expected to be an unwarranted invasion of personal privacy, or could disclose information furnished on a confidential basis. S[ee] R.I. General Laws, specifically, 38-2-2(4)(D)[, 'a]ll records maintained by law enforcement agencies for criminal law enforcement and all records relating to the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal investigation by any law enforcement agency. Provided, however, such records shall not be deemed public only to the extent that the disclosure of the records or information (a) could reasonably be expected to interfere with investigations of criminal activity or with enforcement proceedings.[']

* * *

Additionally, as support of our denial of access, we cite Attorney General's Opinion, Snow v. DPS, PR 10-12 dated June 25, 2010, which states the Department of Public Safety did not violate the APRA by denying a request for an incident report that did not culminate in an arrest. The report was exempt from disclosure pursuant to R.I. Gen. Laws § 38-2-2(4)(i)(D), as well as R.I. Gen. Laws § 38-2-2(4)(i)(A)(I),² since the report concerned an investigation into a particular officer; and Giacobbe v. RIDPS, PR 10-05, issued April 5, 2010, which stated the Department of Public Safety did not violate the APRA when it denied reports about an individual that did not result in an arrest.

² These sections of the law are now codified at R.I. Gen. Laws §§ 38-2-2(4)(D)(c) and 38-2-2(4)(A)(b), respectively. Rhode Island General Laws § 38-2-2(4)(A)(b) exempts, in pertinent part:

“[p]ersonnel and other personal individually-identifiable records otherwise deemed confidential by federal or state law or regulation, or the disclosure of which would constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. 522 et. seq.”

While Mr. Pickering seemingly asserts that the Rhode Island State Police has inappropriately denied the request by applying a ‘blanket’ exemption, this denial was in fact based on well established case law and former Rhode Island Attorney General Opinions. See also, Chappell v. RISP, PR08-10; Radtke v. Rhode Island Department of Public Safety, PR 13-10.”

We acknowledge your reply dated February 24, 2014.

At the outset, we note that in examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the DPS violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

Here, we begin by observing that the documents you seek concern an incident report and not an arrest report. Since no arrest report exists, and since no arrest has been effectuated, the APRA’s mandate that “records or reports reflecting the initial arrest of an adult and the charge or charges brought against an adult shall be public” is not applicable. See R.I. Gen. Laws § 38-2-2(4)(D).

Simply because an arrest has not occurred does not, by itself, dictate that the requested records are exempt from public disclosure. Instead, the APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or to copy such records. See R.I. Gen. Laws § 38-2-3(a). Under the APRA, a record is public unless it falls within one of several enumerated exemptions or the balancing test. See R.I. Gen. Laws § 38-2-2(4)(A)-(AA); see also Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998). Here, the DPS cites R.I. Gen. Laws § 38-2-2(4)(D)(c), which exempts in pertinent part, the disclosure of law enforcement records for criminal investigative purposes if disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” We look to the Federal Freedom of Information Act (FOIA) to guide our analysis, which for purposes of this inquiry contains an exemption that mirrors R.I. Gen. Laws § 38-2-2(4)(D)(c) verbatim.³

³ The relevant portion of the FOIA exempts from public disclosure records or information compiled for law enforcement purposes where disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 522(b)(7)(C). The Rhode Island Supreme Court has stated that “[b]ecause [the] APRA generally mirrors the Freedom of Information Act, 5 U.S.C.A. § 552 (West 1977), we find federal case law helpful in interpreting our open record law.” Pawtucket Teacher’s Alliance Local No. 920 v. Brady, 556 A.2d 556, 558 n.3 (R.I. 1989).

In brief, you argue that the public interest in disclosure outweighs any privacy interests. At the time of the DPS investigation, you contend that Mr. Doe was a town employee⁴ accused of using town resources during town business hours for personal benefit. Because of these allegations, you contend that “[e]verything about this case is ‘public,’” and that the “public interest is high.” You also suggest that Mr. Doe’s privacy interest is minimal because these allegations have been publicly reported in the media and because Mr. Doe “voluntarily appeared on camera” with a Rhode Island media organization to discuss these allegations.⁵ We must consider the public interest and the privacy interests, as elucidated through case law. We begin by examining the privacy interest at stake.

As discussed above, you contend that the privacy interest in the disclosure of the requested records is minimal, principally based upon your assertion that this matter and Mr. Doe’s identity have “already been widely reported for the past five months,” including one television appearance by Mr. Doe. Respectfully, the United States Supreme Court has examined – and rejected – a similar argument.

In United States Department of Justice v. Reporters Committee for the Freedom of the Press, 109 S.Ct. 1468 (1989), the Court considered a media request for a “rap sheet” or criminal history report for a private citizen who had some interaction with a member of Congress. Reporters Committee made virtually the same argument that you advance in this case – “[b]ecause events summarized in a rap sheet have been previously disclosed to the public, [the] privacy interest in avoiding disclosure of a federal compilation of these events approaches zero.” Id. at 1476. The Supreme Court “reject[ed the Reporters Committee’s] cramped notion of personal privacy.” Id. Later in its Opinion, the Court addressed the same argument that you advance in this case and explained that “the fact that ‘an event is not wholly ‘private’ does not mean that an individual has no interest in limiting disclosure or dissemination of the information.” Id. at 1480. For this reason, any assertion that as a matter of law there cannot be an “unwarranted invasion of personal privacy” in this case based upon prior media reports is simply misplaced and has already been rejected by the United States Supreme Court. See also Blethen Maine Newspapers v. State, 871 A.2d 523, 530 (Me. 2005)(“The prior public disclosure of information does not generally extinguish privacy interests in the nondisclosure of the same information organized and contained in the investigative records of a law enforcement agency.”)(plurality).

While Reports Committee disposes of one of your arguments that the privacy interests in this case are minimal due to prior public statements and/or published reports, a far more significant consideration is the nature of your APRA request, *i.e.*, records concerning a particular identifiable individual who was investigated by the DPS for possible criminal activity, but was

⁴ You indicate that Mr. Doe is no longer employed by the Town of Tiverton. The circumstances of this separation are unknown to us. See Pawtucket Teachers Alliance v. Brady, 556 A.2d 556, 559 (R.I. 1989)(concluding that management study report identifying school principal exempt from public disclosure and noting that principal had since transferred).

⁵ During this television interview, Mr. Doe denied any impropriety.

never charged or arrested. The privacy interests in the disclosure of such records are significant and the great weight of cases supports this conclusion.

One of the leading cases on this issue is Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 856 (D.C. Cir. 1981), where the plaintiff sought records pertaining to investigations conducted by the Watergate Special Prosecution Force (“WSPF”). The government objected to disclosure based upon Exemption 7(C) – the FOIA exemption that is equivalent to R.I. Gen. Laws § 38-2-2(4)(D)(c) – and the District Court upheld this exemption for “information which would reflect investigations of allegations of possible wrongdoing by individuals who were neither indicted nor prosecuted.” Id. at 861. On appeal, the plaintiff argued that “most of the information in question was not properly within Exemption 7(C) because the individuals to whom it relates are high level government and corporate officials whose interest in privacy is at best minimal.” Id. The Court of Appeals rejected this argument and explained that:

“[t]o release the identities of these individuals and the information collected about them where it does not pertain to (appellant) would announce to the world that these individuals were targets of an FBI investigation. There can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the subject of an FBI investigation.” Id. at 864 (emphasis added).

The Court continued that:

“[w]e might be persuaded under appropriate circumstances that an individual’s status as a ‘public figure’ would tip the 7(C) balance in favor of disclosure. This is not, however, such a case. While such a [high level government employee] status might somewhat diminish an individual’s interest in privacy, the degree of intrusion occasioned by disclosure is necessarily dependent upon the character of the information in question. As we have already indicated, revelation of the fact that an individual has been investigated for suspected criminal activity represents a significant intrusion on that individual’s privacy cognizable under Exemption 7(C). The degree of intrusion is indeed potentially augmented by the fact that the individual is a well known figure and the investigation one which attracts as much national attention as those conducted by the WSPF. The disclosure of that information would produce the unwarranted result of placing the named individuals in the position of having to defend their conduct in the public forum outside of the procedural protections normally afforded the accused in criminal proceedings.” Id. at 865 (emphasis added).

In a subsequent case, another Court of Appeals explained:

“the FBI agents, government employees, third-party suspects, and other third parties mentioned or interviewed in the course of the investigation have well-recognized and substantial privacy interests in the withheld information. Among

other things, these individuals have a substantial interest in the nondisclosure of their identities and their connection with particular investigations because of the potential for future harassment, annoyance, or embarrassment. * * *

As we noted, it appears that the district court may have discounted these privacy interests because the identities of some or all of the individuals have been publicly disclosed or were publicly available. To the extent it did do so, this was in error. In Reporters Committee, the Supreme Court rejected the argument that the public availability of information necessarily renders nonexistent the privacy interests in that information protected by Exemption 7(C). * * * [I]t is quite likely that, ‘unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure.’” Neely v. Federal Bureau of Investigation, 208 F.3d 461, 465 (4th Cir. 2000) (emphasis added)(citations omitted).

See also Blethen Me. Newspapers, Inc. v. State, 871 A.2d 523, 529 (Me. 2005) (“[f]ew people wish to be publicly associated with investigations of alleged criminal conduct, whether as a perpetrator, witness, or victim”)(plurality); id. at 539 (“Federal courts have wisely observed that people do not want their names connected with criminal investigations.”)(Clifford, J., joined by Rudman and Alexander, JJ., dissenting); Mack v. Dep’t of the Navy, 259 F.Supp.2d 99, 106 (D.D.C. 2003)(recognizing that “individuals have a strong privacy interest in avoiding unwarranted associations with alleged criminal activity”); Perlman v. United States Department of Justice, 312 F.3d 100, 106 (2nd Cir. 2002)(“[t]hese parties possess strong privacy interests, because being identified as part of a law enforcement investigation could subject them to ‘embarrassment and harassment,’ especially if ‘the material in question demonstrates or suggests they had at one time been subject to criminal investigation’”); American Civil Liberties Union v. United States Department of Justice, 655 F.3d 1, 7 n.8 (D.C. Cir. 2011)(“The Justice Department correctly notes this court has held that disclosure of records revealing that an individual was involved or mentioned in a law enforcement investigation implicates a significant privacy interest.”).

The above discussion demonstrates that contrary to your assertion, a person (such as Mr. Doe) whose name appears and is subject to a criminal law enforcement investigation does indeed have a significant privacy interest in the public disclosure of the requested records and, in accordance with Reporters Committee, this privacy interest is not erased by prior publicity. Having considered the privacy interest, we next must address the public interest advanced by disclosure of the requested records. We begin this analysis by once again considering Reporters Committee, which explained that the main purpose of the FOIA (and by extension to this case, the APRA) is to “shed light on how Government operates.” Reporters Committee, 109 S.Ct. at 1482. Indeed, the Court elucidated that the FOIA, or in this case the APRA:

“focuses on the citizens’ right to be informed about ‘what their government is up to.’ Official information that sheds light on an agency’s performance of its

statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about the agency's own conduct. In this case – and presumably in the typical case in which one private citizen is seeking information about another – the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.” Id. at 1481-82 (emphasis added).

Later, the Supreme Court added that:

“[c]onceivably [the] rap sheet would provide details to include in a news story, but, in itself, this is not the kind of public interest for which Congress enacted the FOIA. In other words, although there is undoubtedly some public interest in anyone's criminal history * * * the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.” Id. at 1482 (emphases in original).

The Supreme Court closed Reporters Committee by holding:

“as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no ‘official information’ about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is ‘unwarranted.’” Id. at 1485.

See also National Archives and Records Administration v. Favish, 541 U.S. 157, 166 (2004)(“where the subject of the documents ‘is a private citizen,’ ‘the privacy interest . . . is at its apex.’”).

Respectfully, your correspondences to this Department make clear that you are seeking information concerning a particular individual and do not seek “to discover anything about the conduct of the agency that has possession of the requested records.” Reporters Committee, 109 S.Ct. at 1481-82. Accordingly, the public interest advanced by disclosure of the requested records is minimal. As an example, in asserting the public interest, you relate that Mr. Doe “was accused of using town-owned resources and town-owned equipment during his taxpayer-funded employment hours, for personal gain” and that “[e]verything about this case is ‘public.’” Two glaring issues confront your conclusion in this case.

First, your averment and APRA request appear to fall directly in line with Reporters Committee's conclusion, which held "as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'" Id. at 1485 (emphasis added). Reporters Committee makes clear the FOIA (and in this case the APRA) is focused on shedding light on an agency's performance of its responsibilities. While it can be debated whether or not Mr. Doe is a "private citizen," there can be little question that your APRA "request seeks no 'official information' about a Government agency." Id.

In this respect, your correspondences indicate that because Mr. Doe was a town employee who was alleged to have improperly used town resources on public time for personal use, the "public interest is high." While you never expressly identify the "public interest," nor do you expressly indicate how the "public interest" will be advanced through disclosure, the totality of your correspondences suggest that you seek disclosure to uncover the facts supporting the allegations against Mr. Doe, and not "to discover anything about the conduct of the agency that has possession of the requested records." Reporters Committee, 109 S.Ct. at 1481-82. In fact, you make clear that you "have complete faith that the Rhode Island State Police properly investigated this case and found insufficient evidence or grounds for criminal charges." See February 6, 2014 correspondence. Faced with this acknowledgment, combined with the totality of your correspondences, there is simply no evidence before this Department that your request seeks to discover anything concerning the DPS's investigation, but rather is focused on discovering matters relating to Mr. Doe and the allegations levied against Mr. Doe.

This latter point leads to the second glaring issue concerning your conclusion that the public interest in disclosure outweighs the privacy interests in this case. Based upon your correspondences it appears that you assert the public interest is advanced in this case since the nature of the underlying allegations concerned the misuse of municipal resources. To be absolutely clear, as a general matter, this Department takes no issue with your general proposition that the public interest is advanced through the disclosure of documents that reveal government employee theft and case law support this conclusion. See Cochran v. United States, 770 F.2d 949, 957 (11th Cir. 1985) ("misappropriation of government funds, in whatever amount, by a high level government official qualifies as a textbook example of information the FOIA would require to be disclosed to the press"); Sullivan v. Veterans Administration, 617 F.Supp. 258, 261 (D.D.C. 1985) ("the VA found that plaintiff had engaged in improper and illegal activities, and specifically stated [so] in its letter of reprimand to plaintiff"); Stern v. Federal Bureau of Investigations, 737 F.2d 84 (D.C. Cir. 1984)(name of high-ranking government employee who knowingly participated in cover-up public).

The glaring problem confronted in this case – but respectfully not addressed in your correspondences – is that the DPS found insufficient probable cause to believe that a crime had been committed. This consideration is critical to our APRA analysis because although you contend that the employee misconduct that you seek to uncover advances the public interest in this case – and although as a general matter we agree that uncovering government employee theft

does advance the public interest – here, the DPS found insufficient evidence to make an arrest. Moreover, your February 6, 2014 letter indicates that you have “complete faith that the Rhode Island State Police properly investigated this case and found insufficient evidence or grounds for criminal charges.” Such facts, as presented to this Department, leaves this Department with the simple query whether the disclosure of law enforcement records that did not lead to criminal charges, identify a particular person, and where no allegation has been made concerning the propriety of the DPS investigation “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” R.I. Gen. Laws § 38-2-2(4)(D)(c). For all the reasons stated above, we answer this question in the affirmative. Not only is this conclusion consistent with federal law, but it is also in accord with this Department’s past findings and a recent decision from the Rhode Island Superior Court. See The Providence Journal v. Department of Public Safety, No. 12-5458 (Carnes, J.); See also Radtke v. Dept. of Public Safety, PR 13-10 (the Department of Public Safety did not violate the APRA by denying a request for an incident report that did not culminate in an arrest); McQuade v. Rhode Island State Police, PR 13-03 (same); Zompa v. West Warwick Police Dept., PR 13-07 (same); In re Cumberland Police Department, ADV PR 03-02; Pawtucket Teachers Alliance v. Brady, 556 A.2d 556 (R.I. 1989); Robinson v. Malinoff, 770 A.2d 874, 877 (R.I. 2001)(exempting all investigative records pertaining to Officer Robinson after the grand jury returned a no true bill).⁶

Lastly, we address your query concerning the DPS releasing these records to the Town of Tiverton, but not to you. You ask “[w]ouldn’t the same law that prevents release of these records to the Sakonnet Times, and presumably to any private citizen who requests them, also prevent their release to Tiverton town officials?”⁷ While the Rhode Island Superior Court has previously rejected the argument that a public body waives its right to assert an APRA exemption when it discloses the same documents to another APRA requester, see Fuka v. Department of Environmental Management, No. 07-1050, R.I. Superior Court (Indeglia, J.), no evidence has been presented in this case that the Town of Tiverton made an APRA request to the DPS and nothing within the APRA (or any other law) prohibits the DPS from providing the Town of Tiverton such documents under these circumstances.

⁶ Not only is our conclusion consistent with case law, but your February 6, 2014 correspondence acknowledges that under the APRA there are “clear distinctions between the public arrest records of those formally charged by law enforcement, and the privacy rights of those wrongfully accused of a crime.” Despite this recognition, and considering that Mr. Doe was not charged with a crime, you nonetheless submit that R.I. Gen. Laws § 38-2-2(4)(D)(c) should not apply in this case. In light of the “clear distinctions,” which you recognize, the conclusion that R.I. Gen. Laws § 38-2-2(4)(D)(c) should not apply in this case is, respectfully, never fully explained.

⁷ The APRA does not prohibit the release of any documents, instead, it requires “public records” to be disclosed. See In re New England Gas Co., 842 A.2d 545, 551 (R.I. 2004)(“the APRA exemptions, similar to those under the FOIA, allow public agencies to withhold documents, but do not require withholding”).

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Although the Attorney General has found no violation and will not file suit in this matter, nothing within the APRA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). Please be advised that we are closing this file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Lisa Pinsonneault".

Lisa Pinsonneault

Special Assistant Attorney General

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LP/pl

Cc: Lisa S. Holley, Esquire
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